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THE DELINQUENT STATE: ILLINOIS AND COMPLIANCE WITH WORKERS' COMPENSATION JUDGMENTS

INTRODUCTION

At Pinckneyville Correctional Center, one of the State of Illinois's many prisons, a hardworking corrections officer attempts to subdue a schizophrenic inmate by wrestling him to the ground.¹ As he forces the prisoner to the ground, the officer falls, striking his right elbow and right hand against the prison's concrete floor.² As a result of this injury, the officer seeks medical treatment with a hand and arm specialist who ultimately performs surgery to alleviate the officer's symptoms.³ After his condition improves, the officer returns to work at the Pinckneyville prison.⁴ In order to recover expenses from his injury, the officer proceeds with a workers' compensation claim, where an arbitrator orders his employer, the State of Illinois, to pay the medical bills accrued as a result of his hand and elbow injuries.⁵ Although the officer still suffers from some lingering symptoms in his wrist and elbow, he is pleased with the result of his surgery, and the arbitrator's order, which required the State to pay the costs of his medical treatment.⁶

However, soon after receiving the arbitrator's decision, the recovering officer begins to receive collection notices regarding his previously accrued medical bills.⁷ If his debt is not paid, the notices indicate, the officer's credit score will be affected.⁸ Confused and frustrated, the officer contacts his

1. This introduction is based on several workers' compensation cases filed against the State of Illinois by its employees, mostly corrections officers in State prisons. This particular injury is based on the case of *Wece v. Pinckneyville Correctional Center*, No. 08 WC 43914 (Ill. Workers' Comp. Comm'n 2009) (Dibble, Arb.), *aff'd*, 11 I.W.C.C. 0673 (Ill. Workers' Comp. Comm'n 2011).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Wece*, No. 08 WC 43914.

7. *McDonald v. Pinckneyville Corr. Ctr.*, No. 04 WC 13082 (Ill. Workers' Comp. Comm'n 2010) (order); Petitioner's Statement of Exceptions and Supporting Brief at 2, *Starkweather v. Menard Corr. Ctr.*, No. 08 WC 030919 (Ill. Workers' Comp. Comm'n 2009).

8. See George Pawlaczyk & Beth Hundsdorfer, *Menard Chief Among 60 Who've Gotten State Money for Injuries*, BELLEVILLE NEWS-DEMOCRAT, Jan. 17, 2011, <http://www.bnd.com/2010/12/19/1522293/state-foots-bill-for-hurt-guards.html> (quoting attorney Thomas C. Rich, "'I

attorney to ask why he has been receiving collection notices from the medical providers who performed his surgery, since the workers' compensation judgment ordered his employer, the State, to pay for his medical bills. After investigating the status of his client's medical bills, the attorney discovers that, in contravention of the order of the arbitrator, the State has not made any payments to the officer's medical providers.⁹ In order to protect the credit score and financial status of his client, the attorney files a petition for penalties under the Workers' Compensation Act, which allows the injured employee and his attorney to collect extra monetary compensation when an employer does not pay the employee's bills on time.¹⁰ When the prison guard and his attorney inquire into why the State has not paid the employee's bills, the State, through its assistant attorney general, says that "the state cannot pay bills with money that it does not have."¹¹

As many Illinois state employees have realized, for the past several years the State has been experiencing financial duress stemming from statewide and far-reaching budgetary problems.¹² Although numerous other state-funded programs have received noted publicity, one greatly affected area which has only begun to receive public attention involves the impact this financial duress has had on the State's injured employees and the workers' compensation system. In many instances, the State's lack of funds has resulted in late payments to its employees' medical providers, which, under the Act, triggers the imposition of penalties should the delay be considered "unreasonable or vexatious."¹³ In fact, the State has sought to utilize its defense of financial duress in order to avoid the payment of Section 16, 19(k), and 19(l) penalties to its employees under the Workers' Compensation Act.¹⁴ Furthermore, the State has asserted that as a governmental body, it should be due leniency by the Workers' Compensation Commission due to its financial duress and remain exempt from timely payment of its employees' medical bills and penalties under the Act.¹⁵

Additionally, the State, by way of statute, has already excepted itself from other provisions regulating workers' compensation benefits payable to its employees. Section 2 of the Workers' Compensation Act provides that an

have clients whose credit ratings have gone down the toilet,' because the state is late or fails to pay [for injured workers' medical bills].").

9. *See id.* (describing the "common state practice of not paying or delaying payment of [injured workers'] medical bills").

10. *See infra* Part I.D (explaining the standards for the imposition of various penalties under the Workers' Compensation Act).

11. Pawlaczyk & Hundsdorfer, *supra* note 8.

12. Bob Sexter, *Illinois Speeds Toward Financial Chaos*, CHI. TRIB., Feb. 24, 2010, § 1, at 4.

13. *See* 820 ILL. COMP. STAT. 305/16 (2008); *id.* 305/19(k).

14. *See infra* Part III.B.1–2.

15. *See infra* Part III.B.1–2.

employer in the state may elect to provide and pay compensation for accidental injuries sustained by himself or any employee.¹⁶ Ordinarily, in order to qualify for “self-insurance,” as this coverage is called, an employer must meet certain requirements, including a demonstration of sufficient financial strength to meet workers’ compensation obligations in a timely manner.¹⁷ However, in the Illinois Administrative Code, it is noted that only *private* employers who are attempting to qualify for self-insurance must seek approval from the Commission in order to self-insure.¹⁸ In fact, the Illinois Administrative Code notes specifically that “[a] private employer does not include . . . the State of Illinois.”¹⁹ Furthermore, while private employers may have their self-insured status revoked if payments of bills are not made in a timely manner, the State is not subject to these rules, and no indication is given that the State’s self-insured status can ever be revoked.²⁰ As a result, the State essentially functions as a self-insured employer whose status cannot be revoked even if the State fails in its duty to provide compensation to its injured employees.

These present circumstances in Illinois workers’ compensation, combined with the current financial strain placed on the State, have created an undesirable set of conditions for the employees of the State. Many employees’ compensable medical bills remain unpaid by the State, their employer.²¹ As indicated, some employees have also received telephone calls or collection notices regarding these unpaid bills, and some have had their credit affected by these outstanding bills.²² While these employees have petitioned for penalties under the Act as a result of outstanding medical bills, the State has similarly asserted it will not pay these penalties due to its lack of funding.²³ As a self-insured employer, the State has an obligation to pay for its employees’ workers’ compensation benefits.²⁴ However, since the State’s self-insured status cannot be revoked, and payments have not been forthcoming, the State’s employees are left essentially remediless, even in spite of all the protections provided by the Workers’ Compensation Act.²⁵ The medical providers who supply treatment to the State’s employees are also constrained by small and

16. 820 ILL. COMP. STAT. 305/2 (2008).

17. See ILL. ADMIN. CODE tit. 50, § 7100.70 (2010).

18. *Id.* § 7100.70(a)(1)(A).

19. *Id.*

20. See *id.* § 7100.70.

21. See, e.g., McDonald v. Pinckneyville Corr. Ctr., No. 04 WC 13082 (Ill. Workers’ Comp. Comm’n 2010) (order).

22. See *supra* note 7.

23. See *supra* note 11 and accompanying text.

24. 820 ILL. COMP. STAT. 305/2 (2008).

25. See *id.* (stating that employers who elect to self-insure, such as the State, are bound to pay for their employees injuries); ILL. ADMIN. CODE tit. 50, § 7100.70 (2010) (excluding the State from the filing requirements of private self-insurers).

mostly ineffective remedies. Under the Act, in the case of delinquent payments made by employers, medical providers are only entitled to one percent interest accruing per month on their bill.²⁶

While not all employers within the State are subject to the laws of the Workers' Compensation Act, the State itself is compelled to comply with these statutes.²⁷ As a self-insured employer, the State is subject to its own laws, which require timely payment of an employee's compensable medical bills.²⁸ If any other Act-bound employer does not comply with the Commission's specified payment schedule, it is compelled to pay penalties under the Act.²⁹ Additionally, self-insured employers, with the exception of the State, are required to pay penalties, even in spite of financial duress.³⁰

In light of its own laws, as well as the financial constraints placed on its employees due to delinquent payment of their medical bills, the State should be forced to comply with the laws of the State and compelled to pay penalties under the Workers' Compensation Act should it fail to pay its employees' compensable medical bills pursuant to the Act. Part I of this paper discusses the background and nuances of the Illinois Workers' Compensation Act, including the provisions which govern the payment of medical bills and penalties. Part II deals with the State as an employer and discusses the various laws that the State is both excepted from and subject to. Finally, Part III discusses the current financial constraints placed on the State, the resulting failure of the State to pay its employees' medical bills, and the ramifications of the State's financial circumstances on its own employees.

I. ILLINOIS WORKERS' COMPENSATION ACT: BACKGROUND

A. *Scope of the Workers' Compensation Act*

According to precedent set by the Illinois Supreme Court in *Shell Oil Company v. Industrial Commission*, the Illinois Workers' Compensation Act is intended to provide financial protection for employees who sustain accidents arising out of and in the course of employment.³¹ Essentially, this language indicates a two-part test which an employee must meet in order to receive compensation: the injury must "arise out of" and occur "in the course of employment."³² "[A]n injury arises out of one's employment, if, at the time of

26. 820 ILL. COMP. STAT. 305/8.2(d) (2008).

27. *Id.* 305/3.

28. *Id.* 305/8.2(d) (requiring payment to be made within 60 days).

29. *Id.* 305/16, 305/19(k), 305/19(l).

30. *Id.* 305/2 (stating that all employers who elect to comply with the Act are bound by the Act to all of his or her employees).

31. *Shell Oil Co. v. Indus. Comm'n*, 119 N.E.2d 224, 228 (Ill. 1954).

32. *See id.* at 226, 228.

the occurrence, the employee was performing acts [the employee] was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts the employee might reasonably be expected to perform incident to his assigned duties.”³³ Similarly, “[t]he requirement that the injury occur ‘in the course of’ employment is concerned with the ‘time, place, and circumstances of the injury.’”³⁴ In order to meet these requirements, the employee claimant has the burden to show that the injury arose out of and in the course of employment by a preponderance of credible evidence.³⁵

B. Application of the Workers’ Compensation Act to Employers

Another important aspect of the Workers’ Compensation Act includes a determination of which employers are subject to its provisions. While most of the employers who operate businesses within the state are governed by the specifications of the Act, these employers fall into one of two categories: those who are compelled to automatically subscribe to the Act and those who elect to comply.³⁶ The employers who are bound by statute to comply with the Workers’ Compensation Act include “enterprises or businesses which are declared to be extra hazardous”; in addition, it applies automatically to “the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation.”³⁷ The other group of employers who subscribe to the Act do so voluntarily: “[a]n employer in [the] State . . . may elect to provide and pay compensation . . . according to the provisions of [the Workers’ Compensation] Act.”³⁸ In addition, the Act is extraterritorial; any workers hired in the State who perform jobs outside the state or leave the state for their employers are covered by the Illinois Workers’ Compensation Act.³⁹

C. Treatment of Compensable Claims Under the Workers’ Compensation Act

1. Procedural Aspects of Workers’ Compensation Claims

All employers within the province of the Workers’ Compensation Act, those who subscribe voluntarily and automatically, are required to report employee accidents to the Workers’ Compensation Commission, the Illinois organization responsible for the administration and adjudication of statewide

33. *Caterpillar Tractor Co. v. Indus. Comm’n*, 541 N.E.2d 665, 667 (Ill. 1989).

34. *Paganelis v. Indus. Comm’n*, 548 N.E.2d 1033, 1039 (Ill. 1989) (quoting *Scheffler Greenhouses, Inc. v. Indus. Comm’n*, 362 N.E.2d 325, 327 (Ill. 1977)).

35. *See id.* at 1041.

36. *See* 820 ILL. COMP. STAT. 305/2, 305/3 (2008).

37. *Id.* 305/3.

38. *Id.* 305/2.

39. *Id.* 305/1(b)(2).

workers' compensation claims.⁴⁰ When an employer disputes liability for its employee's injury, the first step in a legal proceeding to secure compensation involves a hearing conducted in front of an arbitrator, an expert on Illinois workers' compensation law who acts as a judge and makes initial legal and factual findings of the case.⁴¹ After the arbitrator issues his or her decision relating to the compensability of the employee's claim, that judgment stands as a final verdict unless the losing party appeals to the Workers' Compensation Commission within thirty days after the arbitrator's decision is filed with the Commission.⁴² If the arbitrator's decision is appealed, the claim is reviewed by the Workers' Compensation Commission, a panel of commissioners who specialize in workers' compensation practice.⁴³ Although the arbitrator has the opportunity to view the employee/claimant and make a finding on his or her credibility, the official finding of fact and legal determination of the claim is made by the Commission, who reviews the transcript of proceedings recorded at the employee's arbitration hearing.⁴⁴ Illinois courts have established that the factual and legal findings of the Commission "will not be disturbed unless they are against the manifest weight of the evidence."⁴⁵ As a result, once the Commission has made a determination on any aspect of the compensability of a claim, it is held to the "manifest weight of the evidence" standard of review and becomes difficult to overturn on appeal.⁴⁶

2. Payment of Medical Bills by Employers

Once the Workers' Compensation Commission, through the decision of either an arbitrator or a panel of commissioners, has determined that an employee's injury "arose out of and in the course of" his or her employment,⁴⁷ employees are entitled to receive several benefits.⁴⁸ Among others benefits, Section 305/8(a) of the Workers' Compensation Act specifies that the relevant employer shall provide and pay for all necessary medical aid "which is

40. See Paul A. Krauter, *Basic Aspects of the Workers' Compensation Act*, in ILLINOIS WORKERS' COMPENSATION PRACTICE § 1.4, at 1-9 (2009).

41. Cf. ILL. ADMIN. CODE tit. 50, § 7030 (2010) (describing the arbitration process including the assignment of an arbitrator, the rules of evidence, and requests for hearing).

42. *Id.* § 7040.70 (describing the process for review of arbitration decisions).

43. *Id.* §§ 7040.10-7040.80 (describing the process for Commission review).

44. *City of Chicago v. Ill. Workers' Comp. Comm'n*, 871 N.E.2d 765, 779 (Ill. App. Ct. 2007).

45. *Id.* at 778.

46. See *id.*

47. *Shell Oil Co. v. Indus. Comm'n*, 119 N.E.2d 224, 228 (Ill. 1954).

48. See 820 ILL. COMP. STAT. 305/8 (2008) (outlining the amount of compensation owed to an injured employee). Employers are also required to make these payments to medical providers on behalf of the injured employee if the relevant employer does not dispute legal responsibility for the compensable bills. *Id.*

reasonably required to cure or relieve from the effects of the accidental injury.”⁴⁹ The Act also specifies that the employer is responsible to make payments for the employee’s “treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto.”⁵⁰

In addition to the specifications in the Act regarding which medical bills an employer is responsible to pay, the Workers’ Compensation Act also sets forth a medical “fee schedule,”⁵¹ which gives the Workers’ Compensation Commission the authority to establish the amount payable by employers to medical providers for services rendered to their injured employees.⁵² The specifications of the Fee Schedule include “payment rates, instructions, guidelines, and payment guides and policies regarding application of the schedule.”⁵³ Through the authority provided in the Act⁵⁴ the Commission adopted this fee schedule “to be used in setting the maximum allowable payment for a medical procedure, treatment or service covered under the Act.”⁵⁵ While the amounts of payments required vary depending on the type of treatment or services rendered, the default rule established by the Commission specifies that medical providers shall be reimbursed at seventy-six percent of actual charges.⁵⁶

49. *Id.*

50. *Id.*

51. *Id.* 305/8.2(a).

52. *Id.* 305/8.2(d).

53. ILL. ADMIN. CODE tit. 50, § 7110.90(a) (2010).

54. *See* 820 ILL. COMP. STAT. 305/8.2(a) (2008).

55. ILL. ADMIN. CODE tit. 50, § 7110.90(a) (2010).

56. *Id.* § 7110.90(e). In some instances, employees may choose to use their health insurance to pay for necessary medical treatment resulting from work-related injuries instead of immediately exercising their rights under the Workers’ Compensation Act. While the reasons may vary as to why employees would choose to use their group health insurance instead of proceeding through workers’ compensation, oftentimes the use of health insurance results in more immediate treatment for the employee. For example, in many circumstances medical providers are required to seek approval from an employee’s workers’ compensation insurance carrier before certain treatments can be given to an employee, essentially prohibiting the employee from receiving proper treatment and forcing him to live with pain while waiting for workers’ compensation insurance approval. As a result, should an employee choose to use his group health insurance in order to receive treatment for a work-related injury, Section 8(j) of the Workers’ Compensation Act provides a remedy to these insurance providers. 820 ILL. COMP. STAT. 305/8(j)(1) (2008). If the medical services paid by the employee’s group health insurance are considered to be the result of a compensable, work-related injury, the health insurance carrier is entitled to a credit against the employer for the amount paid. *Id.* The rationale for this provision revolves implicitly upon compensability of the injury and subsequent treatment. *See id.* Since an employer is responsible for all of the medical bills stemming from its employees’ work-related injuries, the employer, rather than group health insurance, should ultimately shoulder the burden of these medical bills.

The Act's Medical Fee Schedule also specifies a default timeframe in which employers are required to make payments for their employee's necessary care and treatment.⁵⁷ Section (d) of the Fee Schedule provides that "[w]hen a patient notifies a provider that the treatment, procedure, or service being sought is for a work-related illness or injury and furnishes the provider the name and address of the responsible employer, the provider shall bill the employer directly."⁵⁸ Further the Act specifies the timeframe for payment: "[a]ll payments to providers for treatment provided pursuant to this Act shall be made within 60 days of receipt of the bills," provided that all data necessary to adjudicate the relevant bills is provided.⁵⁹ If the employer is unable or unwilling to pay the medical providers within the sixty-day window provided for in the Fee Schedule, the bill (or a portion thereof) accrues interest at a rate of one percent per month which is payable to the medical provider.⁶⁰ The interest rate payable to providers set forth in the Medical Fee Schedule is one remedy available to medical providers should an employer fail to make timely payments of an employee's bills. However, oftentimes when these payments are delinquent, employees, as well as medical providers, may also suffer financially as a consequence.⁶¹ The Workers' Compensation Act has anticipated such issues and as a result provides for specific types of deterrent penalties available for employees to collect against their employers in the face of the employer's delinquent payments to medical providers.⁶²

D. Imposition of Penalties Under the Workers' Compensation Act

1. Overview

Since its implementation one hundred years ago, the Workers' Compensation Act has also provided for the remedy of additional compensation (hereinafter referred to as "penalties") and the assessment of attorneys' fees to its employees in certain cases.⁶³ When an employer has engaged in an "unreasonable or vexatious delay" in failing to pay benefits to an injured worker, the Act makes these penalties available to employees.⁶⁴ Although the Act has always provided for the assessment of such penalties, the Commission has begun to apply them more liberally, and recent amendments

57. 820 ILL. COMP. STAT. 305/8.2(d) (2008).

58. *Id.*

59. *Id.*

60. *Id.*

61. For a more thorough discussion of the financial consequences suffered by employees as a result of delinquent payment of medical bills, see *infra* Part III.B.2.

62. See, e.g., 820 ILL. COMP. STAT. 305/16, 305/19(k), 305/19(l) (2008).

63. Krauter, *supra* note 40, § 1.18, at 1-32; George J. Picha, *Procedure, Appeals, and Special Remedies*, in ILLINOIS WORKERS' COMPENSATION PRACTICE § 5.51, at 5-45 (2009).

64. 37 Eleanor L. Grossman et al., ILL. LAW & PRAC. *Workers' Compensation* § 151 (2009).

to the Act now allow for a greater assessment of these fees on employers, including new bases for their imposition.⁶⁵

Although not the primary focus of this discussion, one quasi-penalty is available to medical providers as a remedy for employers' delinquent payments of employees' medical bills resulting from work-related injuries.⁶⁶ Specifically, the Workers' Compensation Act provides that employers are required to make payments to medical providers "within 60 days of receipt of the bills as long as the claim contains substantially all the required data elements necessary to adjudicate the bills."⁶⁷ When an employer fails to comply with this payment schedule, the medical provider's bills begin to accrue interest at a rate of one percent per month payable to the medical provider.⁶⁸ While this provision does provide these health care professionals with a small remedy, the actual impact of Section 8.2(d) is limited in that it provides little deterrence to employers from engaging in this type of delay, and usually does not adequately compensate medical providers for the payments which have not been forthcoming from employers and are often delayed for months at a time.

Although the Act's Fee Schedule provides for the aforementioned remedy to medical providers in the case of delayed payment regarding compensable medical bills,⁶⁹ the Act and supplemental case law both provide that additional compensation in the form of penalties and attorneys' fees are available to an *employee* in cases when medical expenses and/or temporary total compensation are not paid or when a delay in payment of such benefits occurs.⁷⁰ In order to discourage employers from delaying payment of medical bills that have not been disputed or have been adjudicated compensable, the Workers' Compensation Act provides three remedies to the employee claimant. These remedial provisions are set forth in Sections 16, 19(k), and

65. Krauter, *supra* note 40, § 1.18, at 1–31 to –32.

66. 820 ILL. COMP. STAT. 305/8.2(d) (2008).

67. *Id.*

68. *Id.*

69. *Id.*; *see supra* Part I.C.2.

70. Picha, *supra* note 63, at § 5.51. Although medical providers who provide treatment to an injured employee often bear the brunt of the financial loss when an employer fails to make payments pursuant to the Act, the remedies available to employees under Sections 16, 19(k), and 19(l) are substantially greater than the 1% interest per month available to medical providers under Section 8.2(d). *See* 820 ILL. COMP. STAT. 305/8.2(d), 305/16, 305/19(k), 305/19(l) (2008). The implicit rationale for the higher amount of penalties available to employees is due to standing issues. Unlike employees, who file for penalties and benefits under the Workers' Compensation Act, medical providers who render services to Illinois employees have no standing to file suit against such employers. As a result, higher penalty rates are available to employees due to the fact that they are the only party available to collect them.

19(l) of the Act and vary in terms of standards for imposition as well as the amount of compensation provided by law.⁷¹

2. Section 19(l) Penalty for Delay

Three types of penalties, which are imposed and applied under two distinct standards, exist throughout the Workers' Compensation Act.⁷² Sections 16 and 19(k) penalties, provided for under the Workers' Compensation Act, are discretionary and require the Commission to find that the employer engaged in "unreasonable and vexatious delay" by refusing to pay temporary total benefits and compensable medical bills.⁷³ However, the other form of penalties available to employees under the Act, those specified under Section 19(l), are more readily obtainable and require a lesser standard than "unreasonable or vexatious delay."⁷⁴

Section 19(l) of the Workers' Compensation Act applies to injuries which occur after February 1, 2006, and specifically provides that:

If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b) [temporary total benefits or payment of medical bills], the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 60 days specified under Section 8.2(d). In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of \$30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed \$10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.⁷⁵

It is important to note that an employer has only fourteen days to inform the employee in writing for the reason of nonpayment after receiving a written demand for payment of temporary total benefits under Section 8(b).⁷⁶ However, in the case of medical benefits, the commencement of the fourteen-day response is extended by Section 8.2(d) of the Act as all medical benefits

71. See 820 ILL. COMP. STAT. 305/16, 305/19(k), 305/19(l) (2008).

72. See *infra* Part I.D.2–4 (discussing in basic terms the three types of penalties provided for under the Illinois Workers' Compensation Act).

73. See *infra* Part I.D.3–4.

74. Picha, *supra* note 63, § 5.52, at 5–46 (noting that "a higher standard is required for assessing § 19(k) penalties and § 16 attorneys' fees" than for the penalty available under Section 19(l)).

75. 820 ILL. COMP. STAT. 305/19(l) (2008).

76. Picha, *supra* note 63, § 5.52, at 5–47.

payments must be made “within 60 days of receipt of the bills as long as the claim contains substantially all the required data elements necessary to adjudicate the bills.”⁷⁷ Additionally, under Section 19(l), when an employer delays payment by fourteen or more days as specified above, a rebuttable presumption of unreasonable delay is created.⁷⁸ The critical test to determine when an employer does in fact have a “good and just cause” for disputing liability is again one of reasonableness.⁷⁹ However, “[a]n employer’s reliance on its own physician as to appropriate treatment or the extent of the employee’s inability to work does not establish, by itself, that its challenge to liability for temporary total compensation was made in good faith.”⁸⁰ In fact, “penalties under §19(l) . . . generally will not be awarded when the employer acts in reliance on a qualified medical opinion to dispute an employee’s entitlement to such benefits or when there are conflicting medical opinions.”⁸¹ As a result of the rebuttable presumption which arises against the employer should he or she fail to make payments of an employee’s benefits after a written request has been submitted, Section 19(l) penalties are often the more commonly imposed form of additional compensation and are more easily obtained by decision of arbitrators and the Workers’ Compensation Commission.⁸²

3. Section 19(k) Delay in Payment of an Award

The rules for imposition of Section 19(k) penalties also apply to the assessment of attorneys’ fees and costs, in that both penalties may be awarded for an “unreasonable or vexatious delay in the payment of medical expenses.”⁸³ This standard, as specified by the court in *McMahan v. Industrial Commission*, illustrates that a “higher standard is required for section 19(k) penalties and section 16 attorney fees than for additional compensation under section 19(l).”⁸⁴ Similarly, the standard for assessment of Section 19(k) penalties has been articulated in numerous judicial decisions of the Workers’ Compensation Commission and are cited throughout the Workers’ Compensation Practice handbook.⁸⁵ First, the Commission has determined that the employer bears the initial burden in justifying a delay for payment of

77. 820 ILL. COMP. STAT. 305/8.2(d) (2008).

78. Picha, *supra* note 63, § 5.52, at 5–47.

79. *Id.*

80. *Id.*

81. *Id.*

82. See Picha, *supra* note 63, § 5.52, at 5–46 (noting the lower standard for Section 19(l) penalties and the mandatory \$30-per-day penalty when the payment is late and the employer cannot show an adequate justification).

83. *McMahan v. Indus. Comm’n*, 702 N.E.2d 545, 551 (Ill. 1998).

84. *McMahan*, 702 N.E.2d at 553.

85. See Picha, *supra* note 63, § 5.58, at 5–51.

benefits.⁸⁶ However, “[a]ssessment of penalties (and attorneys’ fees) is not proper if an employer’s nonpayment is based on a reasonable and good-faith challenge to liability” for the benefits to its employee, and additionally, that the critical test for this type of challenge involves the reasonableness of the belief.⁸⁷ In order to meet the reasonableness test, an employer’s belief must be justified by facts “that a reasonable person in the employer’s position would have.”⁸⁸

As a result of the higher standards required to impose penalties under Section 19(k) of the Act, the amounts awarded in these instances can be substantial. When unreasonable or vexatious delay of payment of compensation has been determined to exist by the Workers’ Compensation Commission, “then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award.”⁸⁹ Further, in determining when to impose penalties under Section 19(k) for injuries occurring after February 1, 2006, the Commission shall consider “whether an Arbitrator has determined that the claim is not compensable”⁹⁰ among other factors.⁹¹ In *National Manufacturing v. Industrial Commission*, the court further specified that Section 19(k) of the Workers’ Compensation Act “links the penalty to the amount payable at the time of the award, not the amount vexatiously withheld from the claimant”⁹² and “defined the [term] ‘amount payable’ as the entire amount of compensation awarded, but not including any compensation for permanent disability that had not accrued at the time of the penalty hearing.”⁹³

As a result, the Act provides that the Workers’ Compensation Commission “may award penalties for the unreasonable or vexatious delay of payment or intentional underpayment of temporary total compensation on the whole amount awarded, rather than just the unpaid portion.”⁹⁴ However, the phrase “may” indicates discretion on the part of the Commission to impose 19(k) penalties and allows the Commission to base any penalties imposed on the portion of the award that has accrued but has not been paid.⁹⁵

86. *Id.*

87. *Id.*

88. *Id.*

89. 820 ILL. COMP. STAT. 305/19(k) (2008).

90. *Id.*

91. *Id.* “Among other factors” refers to the determination of whether the employer had made payments under Section 8(j) of the Workers’ Compensation Act, which discusses benefits received under a group health plan. *See id.* 305/8(j).

92. *Nat’l Mfg. v. Indus. Comm’n*, 780 N.E.2d 703, 705–06 (Ill. App. Ct. 2002).

93. Picha, *supra* note 63, § 5.56, at 5–50; *see Nat’l Mfg.*, 780 N.E.2d at 705–06.

94. Picha, *supra* note 63, § 5.56, at 5–50 (emphasis added).

95. *See, e.g., Anders v. Indus. Comm’n*, 773 N.E.2d 746, 756 (Ill. App. Ct. 2002); *Kendzora v. Enter. Mfg.*, No. 08 IWCC 864 (Ill. Workers’ Comp. Comm’n 2008) (opinion on review);

4. Section 16 Attorneys' Fees

In workers' compensation claims, a standard maximum fee which an attorney may collect for services rendered is specified under Section 16(a) of the Act. Specifically, the Act provides that

With respect to any and all proceedings in connection with any initial or original claim under this Act, no claim of any attorney for services rendered in connection with the securing of compensation for an employee or his dependents, whether secured by agreement, order, award or a judgment in any court shall exceed 20% of the amount of compensation recovered and paid, unless further fees shall be allowed to the attorney upon a hearing by the Commission fixing fees, and subject to the other provisions of this Section.⁹⁶

In addition to listing the maximum amount recoverable by an attorney in a workers' compensation proceeding, Section 16 also acts as a form of penalty if an employer should, in certain circumstances, fail to make payments of temporary total disability benefits or compensable medical bills.⁹⁷ More specifically, whenever the Workers' Compensation Commission determines that an employer, his agents, or insurance carrier

has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee . . . or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the [employee's] attorney's fees and costs against such employer or its insurance carrier.⁹⁸

Since Section 16 specifically refers to an employer's conduct within the purview of Section 19(k) of the Workers' Compensation Act, attorneys' fees and Section 19(k) penalties for delay are often awarded together for "unreasonable or vexatious delay."⁹⁹

II. THE STATE OF ILLINOIS AS AN EMPLOYER: INSURANCE REQUIREMENTS AND EXCEPTIONS

A. *The State as an Employer*

The formal title to the Illinois Workers' Compensation Act is set forth as the opening provision of the document:

Clohessey v. Kid Snips, Inc., No. 07 IWCC 0403 (Ill. Workers' Comp. Comm'n 2007) (opinion on review).

96. 820 ILL. COMP. STAT. 305/16a(B) (2008).

97. *Id.* 305/16a.

98. *Id.* 305/16.

99. Picha, *supra* note 63, § 5.59, at 5–52.

An Act to promote the general welfare of the people of this State by providing compensation for accidental injuries or death suffered in the course of employment within this State, and without this State where the contract of employment is made within this State; providing for the enforcement and administering thereof, and a penalty for its violation, and repealing an Act therein named.¹⁰⁰

As the title specifies, the Act was enacted in order “to promote the general welfare” of the people of Illinois.¹⁰¹ In addition to the Act’s goals of protecting state citizens and employees, the State has several other vested interests in the Workers’ Compensation Act: the Illinois legislature also drafted and implemented the law into action.¹⁰² As a governmental body, the process of enacting and repealing laws is an essential State function. However, the State also plays another, equally significant role within the process of workers’ compensation claims: employer.¹⁰³ In fact, the very first provision specified within the Workers’ Compensation Act defines an “employer” as: “[t]he State and each county, city, town, township, incorporated village, school district, body politic, or municipal corporation therein.”¹⁰⁴ As a result, the Workers’ Compensation Act has clearly specified that the State, in addition to fulfilling its role as the legislature, acts as an employer under the Act.

B. Self-Insured Employers

One requirement which all employers subject to the provisions of the Workers’ Compensation Act must comply with includes the acquisition of workers’ compensation insurance.¹⁰⁵ Section 4(a) states

[a]ny employer . . . who shall come within the provisions of Section 3 of this Act [regulating self-insured employers], and any other employer who shall elect to provide and pay the compensation provided for in this Act shall: . . . [i]nsure his entire liability to pay such compensation in some insurance carrier authorized, licensed, or permitted to do such insurance business in this State. Every policy of an insurance carrier, insuring the payment of compensation under this Act shall cover all the employees and the entire compensation liability of the insured.¹⁰⁶

Employers who subscribe to the Act have one of two choices in regard to insurance: the employer may choose to obtain third party insurance or an

100. 820 ILL. COMP. STAT. 305/1 (2008).

101. *Id.*

102. *See id.*

103. 820 ILL. COMP. STAT. 305/1(a)(1) (2008).

104. *Id.*

105. *Id.* 305/4(a).

106. *Id.*

employer may elect to “self-insure.”¹⁰⁷ Those employers who choose to follow the provisions set forth in the Act by election shall make such election by “filing notice of such election with the Commission, or by insuring his liability to pay compensation under this Act in some insurance carrier authorized, licensed or permitted to do such insurance business in this State.”¹⁰⁸ Conversely, some employers, including those who are compelled to comply with the Workers’ Compensation Act, may choose to self-insure or hold themselves responsible for any costs incurred by workers’ compensation claims made by their employers in lieu of obtaining a third party insurer.¹⁰⁹ If an employer chooses to self-insure, it must “[f]ile with the Commission annually an application for approval as a self-insurer which shall include a current financial statement, and annually, thereafter, an application for renewal of self-insurance, which shall include a current financial statement.”¹¹⁰

Private employers who choose to self-insure must also meet certain requirements.¹¹¹ In order to comply, a private employer must demonstrate sufficient financial strength to meet workers’ compensation obligations in a timely manner, and must provide security as required by the Commission.¹¹² According to the Commission, if a self-insured employer is financially unwilling or unable to pay its workers’ compensation obligations, a group known as the Illinois Self-Insurers Advisory Board¹¹³ is empowered to and will

107. *Id.* 305/2(a).

108. 820 ILL. COMP. STAT. 305/2(a) (2008).

109. *See id.* 305/4(a).

110. *Id.* 305/4(a)(1).

111. *See* ILL. ADMIN. CODE tit. 50, § 7100.70 (2010).

112. *Id.*

113. The Self-Insurers Advisory Board is created through Section 4a-1 of the Workers’ Compensation Act. 820 ILL. COMP. STAT. 305/4a-1 (2008). According to the Act, the Advisory Board is

for the purpose of providing for the continuation of workers’ compensation and occupational disease benefits due and unpaid or interrupted due to the inability of an insolvent self-insurer . . . to meet its compensation obligations when the employers’ financial resources, security deposit, guaranty agreements, surety agreements and excess insurance are either inadequate or not immediately accessible for the payment of benefits, and to review and recommend to the Chairman of the Commission the disposition of all initial and renewal applications to self-insure filed by private self-insurers under this Act and the Workers’ Occupational Disease Act.

Id. Additionally, Section 4a-3 of the Act provides for the selection of Advisory Board members and specifies that “[t]he Board shall consist of the Chairman of the Illinois Workers’ Compensation Commission, as Chairman of the Board, and six other members appointed by the Chairman who shall be expert in matters of self-insurance for workers’ compensation liability. One such member shall represent the general public.” *Id.* 305/4a-3(a). A vacancy on the Board “shall occur upon his resignation, death, or conviction of a felony,” and also specifies that the Chairman may remove a Board Member from office upon a formal finding of “incompetence, neglect of duty or malfeasance in office.” *Id.* 305/4a-3(b).

assume the outstanding obligations of the insolvent insurer.¹¹⁴ The role of the Advisory Board is to take all necessary steps to collect, recover, and enforce the security posted by the self-insurer.¹¹⁵ Further, future administration of an employer's workers' compensation claims will be determined by the nature of the security posted by the employer.¹¹⁶ If the employer is a current self-insurer who fails to provide sufficient security, such employer's self-insurance privileges can be terminated.¹¹⁷

C. *State of Illinois's Exemption from Self-Insured Requirements*

Since the State is required to comply with the provisions of the Act,¹¹⁸ it has also elected to self-insure under the Workers' Compensation Act.¹¹⁹ However, since the State is not a *private* employer, it is not subject to the requirements which other, private employers must meet in order to self-insure.¹²⁰ Pursuant to the Illinois Administrative Code, public entities, including the State, appear to be excepted from seeking approval from the Commission should they choose to self-insure.¹²¹ Conversely, the Code provides that all private employers must submit an annual report to the Commission seeking approval each year.¹²²

III. ILLINOIS'S FINANCIAL DURESS AND REPERCUSSIONS

A. *Illinois's Financial Crisis*

In addition to the problems faced by the national economy, the State has also recently suffered from severe financial hardships.¹²³ The Illinois state budget has been considered one of the worst in the nation, and problems are estimated to grow worse before they begin to resolve.¹²⁴ Illinois, it has been

114. 820 ILL. COMP. STAT. 305/4a-6(a) (2008).

115. *Id.*

116. ILL. ADMIN. CODE tit. 50, § 7100.70(c)(3) (2010).

117. *Id.* § 7100.70(e)(2).

118. 820 ILL. COMP. STAT. 305/3 (2008).

119. *Id.* 305/4(a)(1).

120. *See* ILL. ADMIN. CODE tit. 50, § 7100.70(a)(1)(A) (2010).

121. *Id.* (excluding the State and other public entities from the definition of "private employer").

122. *Id.* § 7100.70(a)(2)(A).

123. *See* Deanna Bellandi, *Illinois Mired in Financial Crisis*, ST. JOURNAL-REGISTER (Sept. 18, 2010, 10:17 AM), <http://www.sj-r.com/breaking/x191996969/Illinois-mired-in-financial-crisis> (describing the State's \$13 billion deficit and backlog of unpaid bills); Mike Riopell, *Illinois on Financial 'Top 10' Worst List*, PANTOGRAPH, Nov. 12, 2009, at A3 (noting that financially, Illinois is among the "worst-off" states in the country); Terry Savage, *'Our State Is \$120 Billion Short!'*, CHI. SUN-TIMES, Aug. 23, 2010, at 26 ("Illinois is bankrupt."); Selter, *supra* note 12 (describing the State's budget deficit).

124. Riopell, *supra* note 123.

speculated, “has a long history of spending more than it takes in.”¹²⁵ Bob Sector, a reporter for the Chicago Tribune, writes, “[the] Illinois government is staring down the barrel of an explosive financial mess, and perhaps nothing frames the danger better than two big numbers.”¹²⁶ Sector estimates the first number to be \$26 billion, “the grand total that lawmakers have allotted this year for the meat of what the state does: funding education, health care, child welfare, public safety and the machinery of the government itself.”¹²⁷ Numerous sources place the current budgetary deficit at approximately \$13 billion, including “\$8 billion in unpaid bills to social service agencies, pharmacies and others.”¹²⁸

The financial strains placed on the State government have left many to question exactly how and which outstanding bills will be paid. Illinois Governor Pat Quinn has promised “[e]very bill will be paid by the end of this year.”¹²⁹ However, Quinn was actually referring to bills submitted before the end of the fiscal year in 2010, which ended on June 30, 2010.¹³⁰ While the State is taking responsibility for these bills, new debts are accruing.¹³¹ Conversely, Governor Quinn has yet to make any promises regarding the payment of bills submitted after June 30, 2010.¹³² The repercussions of these bill payment strategies could mean “there’s no guarantee that a vendor who did work for the state in August, after the new fiscal year started, will see payment anytime before next year.”¹³³ Some State vendors have even been waiting as long as seven months to receive their payments.¹³⁴ In fact, Illinois’s chief “bill-payer,” Comptroller Dan Hynes, has stated that the State owes upwards of \$5 billion to statewide schools, universities, child-care centers and rehab centers.¹³⁵ Hynes calls this phenomenon “obscene,”¹³⁶ telling the New York Times: “[t]his is not some esoteric budget issue; we are not paying bills for absolutely essential services.”¹³⁷ As a result, the State has been unable to pay the vast majority of its bills, and owes billions to numerous statewide

125. *Id.* (quoting Susan Urahn, Managing Director of the Pew Center for the States).

126. Sector, *supra* note 12.

127. *Id.*

128. Monica Davey, *Questions Persisting as Illinois Raises Taxes*, N.Y. TIMES, Jan. 13, 2011, at A16; see Sector, *supra* note 12.

129. Bellandi, *supra* note 123.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Bellandi, *supra* note 123.

135. Savage, *supra* note 123.

136. *Id.*

137. Michael Powell, *Illinois Stops Paying Its Bills, But Can’t Stop Digging Hole*, N.Y. TIMES, July 23, 2010, at A1.

institutions.¹³⁸ In addition to the schools, universities, child-care centers and rehab centers who are owed money from the State,¹³⁹ the State has been shirking its duties as an employer by failing to pay its employees' medical bills and even penalties which have been imposed by the Workers' Compensation Commission.¹⁴⁰

B. State of Illinois's Payment of Workers' Compensation Medical Bills and Penalties

1. Background

As a result of the State's recent financial problems, many areas of fiscal responsibility have been neglected and many of the State's bills have remained unpaid for a period of up to seven months, while more debt continues to accrue.¹⁴¹ While some organizations have received more publicity in terms of its unpaid bills, for example schools and child-care centers,¹⁴² other aspects of the State's budget, such as payment of its employees' workers' compensation benefits, have been just as severely affected, but have only just begun to receive any media attention.¹⁴³ However, due to the State's financial constraints, the State as an employer has been making delinquent payments on the medical bills accrued by its employees for work-related injuries.¹⁴⁴

As previously discussed, when liability for an employee's claim is not disputed by an employer or the claim has been adjudicated compensable by the Workers' Compensation Commission,¹⁴⁵ an employer is required to reimburse medical providers for treatments given to its employee to "cure or relieve from

138. *Id.*

139. *Id.*

140. See *infra* Part III.B.1 (discussing the State's delinquent payment of its employees' workers' compensation medical bills). Additionally, in response to the State's "fiscal emergency," the Illinois legislature passed a bill in January 2011 that raises individual income tax rates by approximately sixty-six percent. Davey, *supra* note 128. Although the decision to increase taxes has been praised by Pat Quinn, the governor of Illinois, many wonder whether this tax package will be "enough to solve the state's crisis." *Id.*

141. Bellandi, *supra* note 123.

142. Savage, *supra* note 123.

143. See Pawlaczyk & Hundsorfer, *supra* note 8.

144. See the following cases, which describe the delinquent payments made by the State: Dowdy v. Vienna Corr. Ctr., No. 08 WC 05672 (Ill. Workers' Comp. Comm'n 2010) (order); Mabrey v. Ill. Dept. of Corrs., No. 07 WC 09331 (Ill. Workers' Comp. Comm'n 2010) (order); McDonald v. Pinckneyville Corr. Ctr., No. 04 WC 13082 (Ill. Workers' Comp. Comm'n 2010) (order); Studt v. Menard Corr. Ctr., No. 08 WC 55780 (Ill. Workers' Comp. Comm'n 2010) (order); Kinder v. Choate Mental Health Ctr., No. 08 WC 48796 (Ill. Workers' Comp. Comm'n 2010) (Dibble, Arb.), *aff'd* No. 10 I.W.C.C. 0828 (Ill. Workers' Comp. Comm'n 2010); Wece v. Pinckneyville Corr. Ctr., No. 08 WC 43914 (Ill. Workers' Comp. Comm'n 2009) (Dibble, Arb.), *aff'd*, 11 I.W.C.C. 0670 (Ill. Workers' Comp. Comm'n 2011).

145. See *supra* Part I.C.2.

the effects” of a work-related injury.¹⁴⁶ Additionally, if such payments are not made pursuant to the time-frame given in the Medical Fee Schedule of the Workers’ Compensation Act, an employee may make a petition for penalties under several provisions of the Act.¹⁴⁷ As a result of the State’s financial difficulties, the State as an employer has been failing to pay medical providers for services provided to its employees for work-related injuries.¹⁴⁸ The State’s employees, as a result of these late payments, have asserted their rights under the Workers’ Compensation Act to file petitions for penalties.¹⁴⁹ However, rather than pay the penalties incurred by late payment to medical providers, the State has asserted it should be due leniency and has unilaterally exempted itself from payment of the penalties based on the argument that the State is currently a governmental body under financial duress.¹⁵⁰

2. Rationale for Filing of Penalties

As previously discussed, penalties may be imposed against an employer in various circumstances, but typically an employer must fail to make payments to medical providers for an injured employee’s accrued medical bills.¹⁵¹ However, in order to receive any type of additional compensation in the form of penalties, the injured employee must make a motion to the Workers’ Compensation Commission asking for relief in the form of monetary penalties against his or her employer.¹⁵² When an employee files a motion for penalties against his or her employer, the desired result is generally not only to secure additional compensation, but to discourage the employer from engaging in delinquent payments and to protect the financial interests of the medical providers and employees.¹⁵³

While the failure of an employer (such as the State) to pay an employee’s compensable medical bills seemingly impacts medical providers most directly, it can also severely affect employees. For example, when a doctor’s office or hospital does not receive reimbursement from an employer, the medical provider will often seek compensation from another source—the injured worker directly, despite the fact that the employer is bound through the Workers’ Compensation Act to pay such expenses.¹⁵⁴ As a result of the State’s recent lack of financial resources, many State employees have received

146. 820 ILL. COMP. STAT. 305/8(a) (2008).

147. *See id.* 305/16, 305/19(k), 305/19(l).

148. *See infra* Part III.B.4.

149. *See infra* Part III.B.4.

150. *See infra* Part III.B.4.

151. *See supra* Part I.D.1.

152. *See* 820 ILL. COMP. STAT. 305/16, 305/19(k), 305/19(l) (2008).

153. As has been discussed, the penalty provisions of the Act allow for additional payments not only to the employee, but also to the provider of medical services. *See id.*

154. *See* 820 ILL. COMP. STAT. 305/8(a) (2008).

collection notices regarding their unpaid medical bills accrued from their work-related accident.¹⁵⁵ The results of these delinquent payments can not only include collection notices, but can also drastically affect an employee's credit score.¹⁵⁶

In addition to receipt of collection notices and an affected credit score, some State employees have been denied necessary medical treatment or medication due to the State's failure to pay bills in a timely manner. In the case of *Maue v. State of Illinois Menard Correctional Center*, an injured prison guard attempted to see a local physician to treat him for his injuries, but was denied treatment due to the State's "failure to timely authorize and pay for medical treatment."¹⁵⁷ Similarly, in a letter addressed to attorney Mr. Rich, who represents numerous injured workers, the Injured Workers Pharmacy, a group which provides medication to injured workers,¹⁵⁸ stated the following:

As you are aware, Injured Workers Pharmacy (IWP) has been providing your client(s) with their workers' compensation prescription medication for some time now. You may also have heard that the State of Illinois is facing serious financial hardship which has unfortunately impacted our ability to continue to service your state-employed clients.

IWP has been providing medication to the majority of state-employed injured workers for up to a year with minimal reimbursement from the State of Illinois. Claims typically take close to one year before any payment is received, and when/if payment does take place it is at a greatly reduced rate. Therefore, it is with much regret that we must inform you that IWP will no longer be able to provide these clients with medication moving forward. . . .

This is an unfortunate consequence of the financial condition of the State of Illinois.¹⁵⁹

As a result, the financial duress of the State has not only affected the ability of medical providers to collect payments on overdue bills, but also caused State employees to suffer numerous hardships including the receipt of

155. *McDonald v. Pickneyville Corr. Ctr.*, No. 04 WC 13082 (Ill. Workers' Comp. Comm'n 2010) (order); Petitioner's Statement of Exceptions and Supporting Brief at 2, *Starkweather v. Menard Corr. Ctr.*, No. 08 WC 30919 (Ill. Workers' Comp. Comm'n 2009), *aff'd*, 11 I.W.C.C. 0670 (Ill. Workers' Comp. Comm'n 2011).

156. See Pawlaczyk & Hundsdorfer, *supra* note 8 (quoting attorney Thomas C. Rich, "'I have clients whose ratings have gone down the toilet,' because the state is late or fails to pay").

157. Petitioner's Statement of Exceptions and Supporting Brief at 2, *Maue v. Menard Corr. Ctr.*, No. 08 WC 43915 (Ill. Workers' Comp. Comm'n 2009), *aff'd* No. 11 I.W.C.C. 0672 (Ill. Workers' Comp. Comm'n 2011).

158. See IWP: THE PATIENT ADVOCATE PHARMACY, <http://www.iwpharmacy.com/Default.aspx> (last visited Aug. 8, 2011).

159. Letter from Injured Workers Pharmacy to Law Office of Thomas Rich (Dec. 6, 2010) (on file with author).

collection notices,¹⁶⁰ a negative impact on credit scores,¹⁶¹ and in some cases, even a denial of necessary medical treatment or medication.¹⁶² In cases where injured employees of the State suffer such consequences, the only remedy available to them involves the imposition of penalties against the State, since, as previously discussed, the State's self-insured status as an employer cannot be revoked should it be unable or unwilling to pay its employees' bills.¹⁶³ Therefore, especially in cases when an employee has suffered financially as a result of the State's delinquent payments on compensable medical bills, penalties should be imposed and awarded to such employees not only to discourage the State from engaging in practices of non-payment, but to provide some financial relief to injured employees barely able to make ends meet.

3. State's Historical Payment of Penalties

Although the State's financial duress has been a fairly recent issue within the past two to three years, the question of whether the State is subject to the provisions of the Workers' Compensation Act which require timely payment of medical bills or the imposition of specific penalties has been historically analyzed in numerous instances by the Illinois courts.¹⁶⁴ For example, in *Martin v. Giordano*, the Workers' Compensation Commission awarded penalties under Section 19(k) for "unreasonable and vexatious" behavior in late payment of medical bills.¹⁶⁵ After the Commission ordered payment of these penalties, the State as defendant, however, refused payment based on the argument that "the State [was] not subject to section 19(k)"¹⁶⁶ as a result of sovereign immunity.¹⁶⁷ More specifically, the State contended that since liability on the State was not "unequivocally set forth in section 19(k)" of the Workers' Compensation Act, State liability did not exist.¹⁶⁸ On appeal, the appellate court held not only that Section 19(k) of the Act did in fact apply to the State, but also that since other employers may not "pick and choose what 'compensation' they will pay," neither may the State.¹⁶⁹ Furthermore, the *Martin* court made a pivotal distinction in terms of the State's obligations as an employer: that since Section 19(k) of the Act never uses the term

160. See *supra* note 155 and accompanying text.

161. See *supra* notes 156 and accompanying text.

162. See *supra* notes 158–59 and accompanying text.

163. See ILL. ADMIN. CODE, tit. 50, § 7100.70 (2010).

164. See, e.g., *Martin v. Giordano*, 450 N.E.2d 933, 934 (Ill. App. Ct. 1983); *Christopher v. Ill. Dep't of Corr.*, No. 07 IWCC 0257 (Ill. Workers' Comp. Comm'n 2007) (opinion on review).

165. *Martin*, 450 N.E.2d at 934.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 935.

“penalties,”¹⁷⁰ but simply provides for “additional compensation,” when there is an intentional delay of payment, the State had a choice to either pay timely benefits due and owing under the Act or pay additional compensation under Section 19(k) of the Act.¹⁷¹

Similarly, in *Christopher v. State of Illinois Department of Corrections*, the Workers’ Compensation Commission affirmed the arbitrator’s award of additional compensation under Section 19(k) against the State for failure to timely pay medical bills.¹⁷² Although *Christopher* was resolved by the Commission in 2007, the State had already begun to assert a lack of funds as its defense for failing to pay its employees’ medical bills or Section 19(k) penalties.¹⁷³ The arbitrator noted that the employee’s unpaid medical bills were admitted into evidence without objection and that the outstanding balances remaining on the bills were approximately two to seven months old.¹⁷⁴ The State, in response, offered no indication as to when the bills would be paid, but simply stated they would be paid as soon as funds were made available and cited insufficiency of funds as the reason for its delinquent payments.¹⁷⁵ However, in determining that Section 19(k) was applicable to the State in this instance, the arbitrator determined that the State’s defense of insufficient funding did “not meet the burden of justifying the delay in medical benefit payment.”¹⁷⁶ After reviewing the affidavit provided by the State regarding insufficiency of funds, the arbitrator held “[t]his defense would not be available to a private employer and the Act does not except out the State of Illinois for liability for failure to pay benefits timely.”¹⁷⁷ Additionally,

[t]he State has intentionally chosen not to pay this obligation. Respondent has unilaterally decided to place the burden of medical expense payment, and the risks associated with non-payment, on its employees. . . . Self-insured’s, like this Respondent, are in part granted their status by a promise to satisfy their statutory obligations.¹⁷⁸

Furthermore, the arbitrator concluded the decision with a sweeping statement indicating the importance of employer compliance with these provisions: “[t]he failure to pay medical bills has a chilling effect on the Worker’s [sic] Compensation Act and prevents [employees] from seeking needed

170. *Martin*, 450 N.E.2d at 935.

171. *Id.*

172. *Christopher v. Ill. Dep’t of Corr.*, No. 07 IWCC 0257 (Ill. Workers’ Comp. Comm’n 2007) (opinion on review).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Christopher*, No. 07 IWCC 0257.

178. *Id.*

treatment.”¹⁷⁹ Through this statement, the Workers’ Compensation arbitrator and Commission underscored the importance of the State’s compliance with payment of medical bills and resulting penalties if the bills are not timely paid.¹⁸⁰

4. Recent Inconsistent Commission Rulings

Despite the fact that workers’ compensation arbitrators and the Commission have historically awarded penalties against the State under the Workers’ Compensation Act for failure to pay medical bills,¹⁸¹ numerous recent decisions have been handed down from the Commission suggesting that the law in this area may not be well-settled.¹⁸²

For example, in the case of *McDonald v. Pinckneyville Correctional Center*, the employee and his attorney petitioned for penalties against the State, his employer, for delinquent payment of medical bills.¹⁸³ In a determination made by the Commission regarding the imposition of these penalties, the Commission issued an order dated September 8, 2010, which affirmed the award of medical compensation and penalties under Sections 16, 19(k) and 19(l) of the Act.¹⁸⁴ Additionally, the Commission found that the employee and his attorney had requested on four separate occasions that the State pay specific outstanding medical bills to Washington University Physicians.¹⁸⁵

179. *Id.*

180. For a more in-depth look at past Commission decisions underscoring the premise that the State is subject to payment of penalties, see the following cases: *Devine v. State*, No. 08 IWCC 0131 (Ill. Workers’ Comp. Comm’n 2008) (opinion on review) (affirming the arbitrator’s order to the State to pay benefits under Section 19(k), 19(l) and Section 16 attorneys’ fees for failure to timely pay benefits); *Holbrook v. Ill. Dep’t of Transp.*, No. 08 IWCC 1430 (Ill. Workers’ Comp. Comm’n 2008) (opinion on review) (affirming arbitrator’s holding that a failure to tender any evidence to substantiate the State’s refusal to pay benefits is unreasonable and vexatious in nature); *Giordano v. Chester Mental Health Ctr.*, No. 07 IWCC 0397 (Ill. Workers’ Comp. Comm’n 2007) (opinion on review) (affirming arbitrator’s award of additional compensation under Section 19(k) for State’s delay in payment of medical bills); *Lee v. State*, No. 07 IWCC 0163 (Ill. Workers’ Comp. Comm’n 2007) (opinion on review) (affirming arbitrator’s holding that a defense of insufficient funds is not available to a private employer, so it is not available to the State); and *Zemlyn v. State*, No. 06 IWCC 1138 (Ill. Workers’ Comp. Comm’n 2006) (opinion on review) (affirming arbitrator’s holding that insufficient funds available to State does not justify delay in benefit payment).

181. *See supra* Part III.B.3.

182. *Compare McDonald v. Pinckneyville Corr. Ctr.*, No. 04 WC 13082 (Ill. Workers’ Comp. Comm’n 2010) (order), *with Kinder v. Choate Mental Health Ctr.*, 10 IWCC 0828 (Ill. Workers’ Comp. Comm’n. 2010) (opinion on review) (upholding the arbitrator’s determination that “governmental bodies during times of financial stress are entitled to leniency and broad latitude in payment of medical bills”).

183. *McDonald*, No. 04 WC 13082.

184. *Id.*

185. *Id.*

Through no fault of his own, the Commission determined, the employee had continued to receive collection notices regarding the unpaid bills in question.¹⁸⁶ As a result of these factors, the Commission concluded that the State's failure to pay the bills in question, despite stipulating to all the facts regarding compensability, constituted an "unreasonable and vexatious" delay in payment which justified the imposition of penalties.¹⁸⁷ According to the Commission, the State also failed to assert a "good and just cause as to why it has yet to pay said bill."¹⁸⁸

Similarly in *Studt v. Menard Correctional Center/State of Illinois*, while awarding penalties to the employee in question, the Workers' Compensation Commission reemphasized the role which the employer plays in justifying a delay of compensation.¹⁸⁹ Specifically, the Commission noted that "[w]hen a delay in paying compensation has occurred, the employer bears the burden of justifying the delay."¹⁹⁰ Whether the employer's conduct justifies the imposition of penalties, similarly, should be considered in terms of reasonableness and is a factual question for the Commission.¹⁹¹ In *Studt*, the Commission concluded that the State failed to meet its burden of justifying the delay of payment, and that its actions constituted "unreasonable and vexatious" behavior.¹⁹²

The Commission decision of *Taylor v. Vienna Correctional Center* also affirmed an arbitrator's award of penalties under Sections 19(k) and 19(l) against the State.¹⁹³ Most significantly, the Commission's discussion in *Taylor* dealt with the State's repeated assertion that its lack of funds should excuse delinquent payment of medical bills and penalties.¹⁹⁴ The State contended that the precedent set by *Brown v. State of Illinois, Elgin Mental Health Center* was binding on the Commission and the decision of *Brown* should be adhered to in *Taylor*.¹⁹⁵ According to the State, *Brown* stood for the premise that "governmental bodies during time of financial stress are entitled to leniency and broad latitude in payment of medical bills due to financial constraint."¹⁹⁶

186. *Id.*

187. *Id.*

188. *McDonald*, No. 04 WC 13082.

189. *Studt v. Menard Corr. Ctr.*, No. 08 WC 55780 (Ill. Workers' Comp. Comm'n 2010) (order).

190. *Id.* (citing *Bd. of Educ. of Chicago v. Indus. Comm'n*, 442 N.E.2d 861, 865 (Ill. 1982); *Smith v. Indus. Comm'n*, 525 N.E.2d 81, 85 (Ill. App. Ct. 1988)).

191. *Id.* (citing *Avon Prods., Inc. v. Indus. Comm'n*, 412 N.E.2d 468, 470 (Ill. 1980); *Boker v. Ill. Indus. Comm'n*, 489 N.E.2d 913, 918 (Ill. App. Ct. 1986)).

192. *Id.*

193. *Taylor v. Vienna Corr. Ctr.*, No. 10 IWCC 0990 (Ill. Workers' Comp. Comm'n 2010) (opinion on review).

194. *Id.*

195. *Id.*

196. *Id.* (quoting *Brown v. Elgin Mental Health Ctr.*, 94 I.L.C. 0892).

However, the Commission in *Taylor* found the State's reading of *Brown* was simply dicta and instead recited the holding of *Brown* as follows:

“[t]he Commission has given broad latitude to governmental bodies when the delay in payment of compensation is due to financial constraints. However, in the instant case, [the State] failed to show that financial constraints contributed to their failure to act in a timely manner with the processing of an above the red line settlement contract.”¹⁹⁷

The *Taylor* Commission, in determining the inapplicability of *Brown*, noted that *Brown* did not actually cite any legal authority supporting the proposition that governmental bodies are due leniency in times of financial duress.¹⁹⁸ Rather, the *Taylor* Commission established, in conformity with *Martin v. Giordano*, Section 19(k) penalties apply to *all* employers regardless of their formation.¹⁹⁹ As a result, the Commission “decline[d] to create a different standard for imposing penalties and attorneys’ fees for governmental entities under Sections 19(l) and 16.”²⁰⁰ Therefore, since the Commission had imposed penalties and attorneys’ fees in numerous similar cases involving private sector employers, the award of penalties against the State in *Taylor* was warranted.²⁰¹

In October of 2010, the Workers’ Compensation Commission handed down one of its most recent decisions mandating payment of penalties by the State in *Browning v. State of Illinois, Shawnee Correctional Center*.²⁰² In response to the employee’s petition for penalties, the State cited its “financial duress,” the prior Commission decision of *Brown v. Elgin Mental Health Center*, and a “new” provision of the Workers’ Compensation Act allowing one percent interest.²⁰³ In awarding penalties to the employee under all three provisions of the Act, the Commission specified simply that it “declines to relieve [the State] of its obligation to satisfy such an award due to claimed ‘financial duress.’ Many employers, and employees, in this State are under such duress and yet continue to meet their financial obligations.”²⁰⁴

However, in the face of the recent financial duress the State has been experiencing, the Commission has been somewhat more reluctant to impose penalties upon the State in all of the circumstances which, in the past, would

197. *Taylor*, No. 10 IWCC 0990 (quoting *Brown*, 94 I.L.C. 0892).

198. *Id.*

199. *Id.* (relying on *Martin v. Giordano*, 450 N.E.2d 933 (1983)).

200. *Id.*

201. *Id.*

202. *Browning v. Shawnee Corr. Ctr.*, No. 05 WC 54547 (Ill. Workers’ Comp. Comm’n. 2010) (order).

203. *Id.* The “new” provision of the Act referred to by the State is the remedy given to medical providers in Section 8.2(d)(3) of the Act. 820 ILL. COMP. STAT. 305/8.2(d)(3) (2008).

204. *Browning*, No. 05 WC 54547.

have been deemed proper to do so by precedent.²⁰⁵ In *Kinder v. State of Illinois/Choate Mental Health Center*, the workers' compensation arbitrator and Commission denied the imposition of penalties to a similarly situated employee.²⁰⁶ In his decision, the arbitrator determined that although the employee's bills were six months overdue, the employee had been able to receive additional medical treatment and her credit status had not been affected by the State's inability to pay her outstanding bills.²⁰⁷ More importantly, the arbitrator also addressed the issue of the State's financial difficulties and determined that "governmental bodies during times of financial stress are entitled to leniency and broad latitude in payment of medical bills duet [sic] to financial constraint."²⁰⁸ Additionally, the arbitrator and Commission further determined that instead of imposing penalties on the State as an employer, the Workers' Compensation Act provided a remedy to medical providers in the form of interest payments on the balance owed.²⁰⁹

In two additional, recently-issued, Workers' Compensation Commission orders, the Commission again declined to impose penalties against the State for delinquent payments of medical bills.²¹⁰ First, in *Dowdy v. Vienna Correctional Center*, the Commission stated, "[t]aking judicial notice of the state's financial difficulties, the Commission finds that [the State's] failure to timely pay said medical bills was not unreasonable or vexatious" and as a result, the Commission denied the employee's petition for penalties.²¹¹ Similarly, in *Mabrey v. State of Illinois Department of Corrections*, the Commission issued an order simply finding "that the State of Illinois [sic] lack of funding for payment of these bills does not amount to a vexatious or unreasonable delay in payment."²¹²

5. The Need for Consistent Rulings in favor of Penalties

As a result of the aforementioned orders and decisions handed down by the Commission over the past few years, it appears clear that a consistent ruling on the issue of whether the State's financial duress constitutes an exception to the payment of penalties does not exist. In attempting to reconcile these determinations, it is difficult to understand why the Commission has chosen to

205. See *supra* Part III.B.3.

206. *Kinder v. Choate Mental Health Ctr.*, No. 10 IWCC 0828 (Ill. Workers' Comp. Comm'n. 2010) (opinion on review).

207. *Id.*

208. *Id.* (citing *Brown v. Elgin Mental Hosp.*, 94 I.L.L. 0892).

209. *Id.*; see also 820 ILL. COMP. STAT. 305/8.2(d) (2008).

210. *Dowdy v. Vienna Corr. Ctr.*, No. 08 WC 05672 (Ill. Workers' Comp. Comm'n 2010) (order); *Mabrey v. Ill. Dept. of Corrs.*, No. 07 WC 09331 (Ill. Workers' Comp. Comm'n 2010) (order).

211. *Dowdy*, No. 08 WC 05672.

212. *Mabrey*, No. 07 WC 09331.

award penalties to some employees while excluding others in similarly situated circumstances. However, one distinguishable characteristic the arbitrator and Commission seem to implicitly rely on appears in both *McDonald* and *Kinder*. In *McDonald*, penalties were awarded to an employee,²¹³ whereas in *Kinder* the petitioner was denied similar penalties.²¹⁴ While determining that penalties were in fact an appropriate remedy in *McDonald*, the arbitrator noted that the employee had been receiving collection notices regarding the bills which remained unpaid by the State.²¹⁵ In *Kinder*, by contrast, where penalties were denied, the arbitrator determined that although the employee's bills remained outstanding, the employee's credit status had not been affected by the State's inability to pay for her treatment.²¹⁶ As a result, external factors, such as the credit statuses of employees, can guide the rulings of workers' compensation arbitrators and commissioners in determining when to apply penalties against a financially-strapped governmental body.

However, despite the sole distinction seen between *Kinder* and *McDonald*, which may have led the Commission to different results regarding the imposition of penalties, the factors which govern the remaining Commission decisions remain unidentified. When the employee's credit status or ability to receive medical treatment is not mentioned by the Commission,²¹⁷ penalties have been both imposed and denied, with no accompanying rationale provided.²¹⁸ As a result, although information regarding an employee's credit status or ability to receive medical treatment can be probative and even indicative of the Commission's decision when it has been inserted into the claim, when these factors are absent, the determinations of the Workers' Compensation Commission have remained overwhelmingly inconsistent and unpredictable.

In fact, the Act remains silent on the issue of whether an employee's credit status and similar external evidence should be considered by the Commission in determining when to impose penalties. The standard of "unreasonable or vexatious"²¹⁹ behavior, the criteria for imposing penalties under Sections 16 and 19(k) of the Act, has been defined by Illinois courts in numerous

213. *McDonald v. Pinckneyville Corr. Ctr.*, No. 04 WC 13082 (Ill. Workers' Comp. Comm'n 2010) (order).

214. *Kinder v. Choate Mental Health Ctr.*, No. 10 IWCC 0828 (Ill. Workers' Comp. Comm'n 2010) (opinion on review).

215. *McDonald*, No. 04 WC 13082.

216. *Kinder*, 10 IWCC 0828 (2010).

217. This statement is meant to indicate the absence of information regarding whether an employee received collection notices or had been refused further medical treatment and does not signify whether or not the employee actually encountered such problems.

218. See *supra* Part III.B.3–4.

219. 820 ILL. COMP. STAT. 305/16, 305/19(k) (2008).

instances.²²⁰ However, court-defined characterizations of “unreasonable and vexatious” have never included delay in payment’s effect upon an employee. Additionally, while the Commission has discussed and ruled on whether the State’s financial circumstances constitute “unreasonable and vexatious” behavior,²²¹ specific factors which accompany the State’s fiscal situation have not been fully discussed or adjudicated.

Regardless of the individual facts which supplement each claim, e.g., whether the employee has been affected financially by the State’s delinquent payments, the behavior of the State remains the same in each circumstance.²²² Essentially, in all of the aforementioned claims and circumstances, the State has shirked its duty to pay outstanding medical bills in a timely manner,²²³ and has additionally avoided the alternative responsibility of penalties.²²⁴ As a result, it seems the State’s failure to pay benefits to its employees due to its poor financial planning should constitute “unreasonable and vexatious” behavior, especially considering this behavior may cause its employees. As the *Martin* court aptly articulated, “the State of Illinois had a choice.”²²⁵ The Act required that the State either timely pay benefits or give additional compensation in the form of penalties.²²⁶ Since other employers may not “pick and choose” the compensation they will pay, “[n]either may the State of Illinois.”²²⁷ As a result, since the behavior of the State in failing to pay medical bills or penalties is equivalent to the conduct of all other employers who subscribe to the Workers’ Compensation Act, it is appropriate that the State should also be required to fulfill the same obligations as other employers who subscribe to the Act and either choose to make timely payments of medical bills or accept the imposition of penalties.

CONCLUSION

In *Kelsay v. Motorola, Inc.*, one of the seminal cases in Illinois workers’ compensation law, the Illinois Supreme Court noted that the Workers’ Compensation Act, as a piece of legislation, deprives employees of the right to sue their employers in tort.²²⁸ However, since employees give up this common law right, the Act provides protection to these claimants in the form of “prompt

220. *See supra* Part I.D.3–4.

221. *See supra* Part III.B.3–4.

222. *Id.*

223. *Id.*

224. *See supra* Part III.B.3.

225. Petitioner’s Statement of Exceptions and Supporting Brief at 4, *Starkweather v. Menard Corr. Ctr.*, No. 08 WC 030919 (Ill. Workers’ Comp. Comm’n 2007).

226. 820 ILL. COMP. STAT. 305/16, 305/19(k) (2008).

227. *Martin v. Giordano*, 450 N.E.2d 933, 935 (Ill. App. Ct. 1983).

228. *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 356 (Ill. 1978).

and equitable compensation for injuries.”²²⁹ As a result, due to the exclusive nature of a workers’ compensation remedy, the importance of providing employee claimants with a sure award of compensation has been widely acknowledged by the courts.²³⁰ Payment of benefits to an injured employee, including compensable medical bills, therefore, are rights afforded to an employee pursuant to the Workers’ Compensation Act and are an integral part of an employee’s statutory rights.²³¹ When an employer fails to comply with its statutory obligations to make such payments, penalties are available to be assessed against the employer and payable to the employee in reparation for the employer’s “unreasonable or vexatious” behavior.²³²

The State, as a governmental body as well as an employer, has been experiencing a considerable amount of financial duress for the past several years due to poor budgeting.²³³ Due to such fiscal problems, the State as an employer has shirked its duty to provide its employees (and relevant medical providers) with their appropriate remedies under the Act. The result of the State’s failure to pay its employees’ compensable medical bills has had a devastating effect on the State’s employees as well as the judicial determinations of the Workers’ Compensation Commission.²³⁴ While employees have petitioned for the imposition of penalties against the State in circumstances where the State has failed to pay the relevant compensable medical bills, the Commission has handed down numerous inconsistent and unpredictable decisions regarding when such penalties are enforceable.²³⁵ In fact, most employee claims made against the State for penalties are practically indistinguishable.²³⁶ The one guiding factor provided by the Commission on the issue of penalties involves the question of whether an employee has received collection notices or has been unable to receive continued medical treatment.²³⁷ However, when an employee’s credit status has not been made an issue by either party, the Commission’s decisions still remain ambiguous and conflicting as to whether penalties should be assessed against the State.

As a result, the Workers’ Compensation Commission has not provided a clear or reliable precedent on the issue of penalties against the State for delay resulting from financial duress. However, other private employers have engaged in similar behavior and were required to either pay its employees’

229. *Id.*

230. *See, e.g.,* Ocasek v. Krass, 505 N.E.2d 1258, 1259 (Ill. App. Ct. 1987).

231. *See, e.g.,* 820 ILL. COMP. STAT. 305/8 (2008) (discussing the payment of an employee’s compensable medical bills as a statutory right).

232. *See id.* 305/16, 305/19(k).

233. *See supra* Part III.A.

234. *See supra* Parts III.B.2–4.

235. *See supra* Part III.B.4.

236. *See supra* Parts III.B.3–4.

237. *Supra* notes 187–89, 207–10 and accompanying text.

medical bills in a timely manner or accept the imposition of penalties.²³⁸ Likewise, since the State is both a governmental body and an employer, it seems unjust that it receives preferential treatment and an exemption from the rules which bind other employers through the Workers' Compensation Act. Given that the State, through the legislature, implemented the Act into law, it seems even more compelling that the State should, through the Commission, either comply with its provisions or accept the consequence of penalties. By forcing the State to comply with its own policies, scores of injured workers who have suffered the financial consequences of the State's failure to pay their compensable medical bills would receive much needed, just and equitable relief.

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238. See *Martin v. Giordano*, 450 N.E.2d 933, 935 (Ill. App. Ct. 1983).

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